

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KAY M. LOWE

Claimant

VS.

**JOHNSON COUNTY &
BOARD OF COMMISSIONERS**

Self-Insured Respondent

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Docket No. 241,837

ORDER

Both claimant and respondent appealed the February 28, 2005, Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on August 24, 2005.

APPEARANCES

James R. Borth of Olathe, Kansas, appeared for claimant. Eric T. Lanham of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges she sustained repetitive micro-traumas that injured both upper extremities while working for respondent. The parties stipulated claimant's upper extremity injuries arose out of and in the course of her employment with respondent. Moreover, the parties agreed July 14, 1998, was the appropriate date of accident for these repetitive-use injuries.¹

In the February 28, 2005, Award, Judge Foerschler awarded claimant permanent partial general disability benefits based upon an 18 percent whole person functional impairment.

¹ R.H. Trans. at 3.

Respondent contends Judge Foerschler erred. Respondent first argues the Judge should not have considered Dr. Edward J. Prostic's testimony as the doctor's deposition was allegedly taken after claimant's terminal date had expired. Second, respondent argues the admissible evidence establishes that claimant only sustained a 12 percent whole person functional impairment. Finally, respondent contends claimant should not receive any future medical treatment for her alleged upper extremity injuries.

On the other hand, claimant contends the Judge erred by denying her request for reimbursement of prescription drug expense. Claimant also argues the Judge extended her terminal date and, therefore, Dr. Prostic's January 21, 2005, deposition should be considered in this claim. Accordingly, in her brief to this Board claimant requests the Board either to affirm or to increase the award of permanent partial general disability benefits. In addition, claimant requests the Board to grant her request for reimbursement of \$3,163.52 for pain and anti-inflammatory medications. Claimant argues her prescriptions were filled by her family physician after her authorized treating physician, Dr. Barry A. Rose, released her.

The issues before the Board on this appeal are:

1. Should Dr. Prostic's testimony be considered as part of the record in this claim?
2. What is the nature and extent of claimant's injury and disability?
3. Should claimant be reimbursed for prescription drug expense?
4. Should claimant be restricted from requesting future medical benefits?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

1. Claimant commenced working for respondent in April 1995 as the "in-home services coordinator for the accessibility program."² The job required claimant to use a computer keyboard for a substantial portion of her workday. As a result of that work, claimant developed symptoms in both arms.
2. The parties stipulated that claimant sustained repetitive-trauma injuries to both upper extremities that arose out of and in the course of her employment with

² *Id.* at 10.

respondent. The parties also agreed July 14, 1998, was the appropriate date of accident for those injuries.

3. Respondent selected Dr. J. Douglas Cusick to treat claimant. In October 1998, Dr. Cusick operated on claimant's left wrist, performing a carpal tunnel release, a Guyon's canal release, and a tenosynovectomy.
4. Despite Dr. Cusick's surgery, claimant continued to have appreciable symptoms in her left arm. Consequently, claimant consulted her personal physician, who referred her to Dr. Barry A. Rose. In April 1999, Dr. Rose operated on claimant's right wrist and performed both a carpal tunnel release and ulnar nerve release. And in August 1999, Dr. Rose re-operated claimant's left hand and again released the median and ulnar nerves. Following those surgeries, claimant participated in both pain management and work hardening programs.
5. Dr. Rose released claimant from treatment in either December 1999 or January 2000. Claimant then contacted her personal physician to refill the prescriptions that Dr. Rose had prescribed. According to an exhibit introduced at the regular hearing, between July 2, 2001, and October 27, 2004, claimant incurred out-of-pocket expense in the sum of \$3,163.52 purchasing prescribed pain and anti-inflammatory medications. That sum does not include the more than \$2,000 expended by claimant's private insurance carrier for the same period.
6. Despite her bilateral upper extremity injuries, claimant continues to work for respondent. Respondent has accommodated claimant's injuries by lowering her desk and providing her both a touch-pad computer mouse and a voice-activated computer program.

CONCLUSIONS OF LAW

1. Should Dr. Prostic's testimony be considered part of the record in this claim?

The Judge initially designated December 31, 2004, as claimant's terminal date. At the November 9, 2004, regular hearing, the Judge commented upon claimant's terminal date and Dr. Prostic's deposition, as follows:

Judge Foerschler: Do you have him [Dr. Prostic] scheduled?

Mr. Borth: We've tried to schedule it. We haven't gotten our calendars. Obviously we'll have it within the terminal dates.

Judge Foerschler: Don't be too sure of that. What I'll do is I think I'm going to give you to till the end of the year to get your part of this thing lined up or determined at least by then what the status is going to be.

Mr. Borth: December 31st?

Judge Foerschler: Yeah, and then that will give Eric until January 31st to reply to whatever you arrange. I wouldn't have any objection to an extension depending on the availability of these various witnesses that you are going to need. Let's try to get some testimony from Mrs. Lowe, then, and get this thing started. Do you want to come up here and sit, Mrs. Lowe.³

. . . .

Judge Foerschler: . . . If you start running short of time it would be helpful if you could agree to some extensions and just submit an order on it rather than arguing about it. All right?⁴

On January 21, 2005, claimant took Dr. Prostic's deposition. At that time, claimant had filed a motion to extend her terminal date and the parties were awaiting the motion hearing, which was held on February 14, 2005. At that hearing, respondent objected to extending claimant's terminal date as the request was not filed until after the date had expired. Conversely, claimant argued the only reason that the deposition was not taken before her terminal date expired was because she had accommodated respondent's attorney. At the hearing, the Judge extended claimant's terminal date until such time as the Judge received the transcript of Dr. Prostic's testimony.

Judge Foerschler considered Dr. Prostic's deposition in issuing the February 28, 2005, Award.

The Board concludes Dr. Prostic's deposition should be considered part of the record for determining claimant's final award. K.S.A. 2004 Supp. 44-523 provides that terminal dates may be extended by the parties' agreement or upon application for good cause shown. The statute also provides that the administrative law judges are to provide the parties a reasonable opportunity to be heard and to present their evidence. Considering all the facts and circumstances, the Board finds "good cause" existed to extend claimant's terminal date.

³ R.H. Trans. at 8-9.

⁴ *Id.* at 33.

2. What is the nature and extent of claimant's injury and disability?

Claimant continues to work for respondent. Accordingly, claimant requests permanent partial general disability benefits under K.S.A. 1998 Supp. 44-510e as measured by her whole person functional impairment rating.

Dr. Rose, the orthopedic surgeon who operated on both of claimant's hands and released both the median and ulnar nerves, rated claimant as having a 12 percent whole person functional impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.). The record does not disclose how Dr. Rose formulated his functional impairment rating. Dr. Rose last saw claimant in December 1999 and issued the functional impairment rating to respondent's insurance adjuster in June 2000.

On the other hand, claimant's medical expert, Dr. Prostic, examined claimant in August 2000 and rated claimant as having a 23 percent whole person functional impairment under the AMA Guides (4th ed.). A question arose during the litigation whether claimant had developed ulnar nerve entrapment at her elbows, or cubital tunnel syndrome. The record is not clear whether Dr. Prostic's initial rating included any amount for cubital tunnel syndrome. But the doctor testified claimant's bilateral hand and wrist injuries by themselves justified the 23 percent whole person impairment rating using either the Guides' grip index method or the Guides' peripheral nerve entrapment table. Dr. Prostic testified, in part:

Q. (Mr. Borth) Excluding any specific findings with respect to cubital tunnel syndrome, what findings can you make with certainty with respect to Kay Lowe?

A. (Dr. Prostic) Well, this lady has been decompressed at the wrist for both the median and ulnar nerves, twice on one side, once on the other, and continues to have evidence of irritability of both nerves at both wrists, by the Tinel test and by activities that she reports that worsen her hands. And she continues to have some loss of sensation, as well as markedly diminished grip.

So if we give her credit for continuing to have mild ulnar nerve entrapment at each wrist and mild median nerve entrapment at each wrist, by Table 16, page 57, of the AMA Guides Fourth Edition, she was 10 percent of each upper extremity for each of those nerves, and we get back to the same 20 percent of each upper extremity that I chose to use the grip index for.

Q. And, again, would the guidelines then combine those impairments for 23 percent body as a whole?

A. Yes.⁵

Respondent's medical expert, Dr. Anne S. Rosenthal, also testified. Dr. Rosenthal examined claimant in May 2002 and found no evidence of cubital tunnel syndrome. Contrary to representations in respondent's brief to the Board, the doctor did not give an opinion regarding claimant's permanent functional impairment.⁶

The Judge considered both doctors' impairment ratings and, consequently, found claimant sustained an 18 percent whole person functional impairment. Accordingly, the Judge awarded claimant benefits for an 18 percent permanent partial general disability under K.S.A. 1998 Supp. 44-510e. The Board adopts that finding.

3. Should claimant be reimbursed for prescription drug expense?

Dr. Rose prescribed Vioxx and Ultram to claimant. Claimant's testimony is uncontradicted that both Dr. Rose and Dr. Howard Aks, the physician who directed claimant's pain management, advised claimant to see her personal physician for future prescriptions.

Dr. Rose was not asked if the medications for which claimant is now seeking reimbursement were reasonable and necessary to cure or relieve the effects of the work-related injury. Instead, Dr. Rose testified he was not surprised claimant was still taking Neurontin, Vioxx, and Ultram as of May 31, 2002.

Vioxx is just an anti-inflammatory and she -- it doesn't surprise me that she might have been on Vioxx for long term as an anti-inflammatory; it takes the swelling and inflammation away.

. . . .

Well, I mean some people are on it for years if they have arthritis and association with it. Ultram is a non-narcotic pain pill and I think it is relatively safe to take for somebody who has pain. And I'm glad whoever put her on it put her on that rather than a hard-core narcotic. And then the other medicine --

. . . .

⁵ Prostic Depo. at 27-28.

⁶ For future reference, respondent is reminded to cite the transcript and page that support its alleged statements of fact.

-- Neurontin is a medicine for nerves or nerve irritation and that could go on with some sort of neuropathy or just hypersensitive nerves, and somebody put her on that appropriately, I'm sure, based on what I remember about it.⁷

And when asked if those medications were related to the condition the doctor treated, Dr. Rose stated the medications were appropriate for someone with hypersensitive pain.

It would still be associated with somebody who is treated hypersensitive to pain.

. . . .

She could be on those for quite a while.⁸

Likewise, Dr. Prostic was not asked whether the medications for which claimant was seeking reimbursement were reasonable and related. But Dr. Prostic did recommend, considering claimant's ongoing symptoms, "non-narcotic pain medicine, predominantly anti-inflammatory medicines."⁹

Finally, Dr. Rosenthal indicated Vioxx, Ultram, and Neurontin were pain medicines that might be effective in treating hand pain depending upon the source of that pain.

The Judge denied claimant's request that respondent be ordered to reimburse her for the out-of-pocket prescription drug expense. The Award is not entirely clear, but it appears the Judge determined claimant had failed to prove those medications were related to her bilateral hand and wrist injuries.

The Board concludes that claimant should be reimbursed for the prescription drug expenses in question. The evidence establishes that claimant was prescribed the medications in question, or similar medications, for her bilateral hand and wrist injuries. Claimant's testimony is uncontradicted that both Dr. Rose and Dr. Aks instructed her to see her family doctor to refill her prescriptions. Either the family physician was authorized by Dr. Rose to provide claimant with her ongoing medications or respondent acquiesced to that arrangement and neglected to provide an alternative procedure.¹⁰ In either event, respondent should be responsible for the prescription drug expense in question as

⁷ Rose Depo. at 22-23.

⁸ *Id.* at 23.

⁹ Prostic Depo. at 11.

¹⁰ See K.S.A. 44-510j(h).

authorized medical treatment. And, in addition, respondent should provide claimant with ongoing medical services with a physician to prescribe and monitor claimant's medications.

4. Should claimant be restricted from requesting future medical benefits?

The Judge ruled claimant was entitled to request future medical benefits under K.S.A. 2004 Supp. 44-510k. The Board agrees. As indicated above, respondent should provide claimant with ongoing medical services related to her medications. Assuming, however, that claimant may require other medical services, claimant would retain the right to request future medical benefits under K.S.A. 2004 Supp. 44-510k.

AWARD

WHEREFORE, the Board modifies the February 28, 2005, Award entered by Judge Robert H. Foerschler. The Board orders respondent to reimburse claimant prescription expense in the sum of \$3,163.52 and orders respondent to provide claimant with ongoing medical services to prescribe and monitor claimant's medications. The Board adopts the remaining orders entered by the Judge.

IT IS SO ORDERED.

Dated this ____ day of September, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Borth, Attorney for Claimant
Eric T. Lanham, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director